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PRESENT PROBLEMS OF CONSTITUTIONAL LAW.[1]

TEN years ago, one was accustomed to hear the proposition confidently advanced and stoutly maintained that the period of development of constitutional law had closed and that the civilized world was in the period of administrative development. I knew then that this proposition, if not an error, was at least an exaggeration, and everybody knows it now. If the devotees of administrative law and theory had been content to say that constitutional law had reached a much fuller development than administrative law and that its unsolved problems, though highly important, were fewer in number than those of administrative law, no fault could have been found, or could now be found, with the contention. But the events of the last six years especially have shown that the work of the constitution makers is far from completion, and that we have entered, or are about to enter, upon a new period of constitutional development. In view of this situation, it is my purpose to discuss, as far as is possible in the limits of a single paper, a few of the more important problems which await solution or demand a new solution.

All questions of constitutional law, as of political science, may be classified under three grand divisions, *viz.* sovereignty, government and liberty.

I will not enter upon a philosophical treatment of the term and concept, sovereignty. I will only say that in every constitution

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there should be a workable provision for its own amendment, and that in every perfect, or anything like perfect, constitution, this provision should constitute, for accomplishing this purpose, organs which shall be separate and distinct from, and supreme over, the organs of the government, which shall truly represent the reason and the will of the political society and the political power upon which the constitution rests, and which shall operate according to methods and majorities which will always register the well-considered purpose of that society and that power. I hold the first problem of the constitutional law of the present to be the fashioning of the clause of amendment so as to correspond with these principles.

If we examine the constitutions of the great states of the world and contemplate their history during the last twenty-five years, we shall see at once how pressing this necessity is.

Leaving out of account the Austro-Hungarian *Ausgleich*, as partaking more of the character of a treaty than of a constitution, we shall find that the constitutions of three of these states, *viz.* Spain, Italy and Hungary, contain no provisions at all for their own amendment; that all the rest, excepting France and Switzerland, use exclusively the organs of their governments for making constitutional changes; that France uses the personnel of her legislature, but under different organization, for this purpose; that Switzerland accords her legislature a power of initiating such changes, which in practice frequently creates embarrassments to the prompt and certain action of the popular will; and finally that all, except Great Britain, France, Switzerland and perhaps Norway, require such majorities for action as to make these provisions practically unworkable, except in times of great excitement — the very moments, if any, when they should not work.

Let us take, for example, the provision of amendment in the Constitution of the United States, as being the one in which the majority of this audience is probably most interested, and as being the provision made by that great state which more than any other professes to develop through the methods of gradual and peaceable reform rather than through the European and South American methods of revolution and reaction. This constitution was framed originally, without any warrant of existing law, by a

general convention of delegates selected by the legislatures of the different States of the Confederation, except the legislature of Rhode Island; and it was adopted originally, also without warrant of any existing law, by conventions of delegates chosen by the people within these several States. The general convention proposed, or rather ordained, and that too without any warrant of existing law, that the proposed constitution should go into operation when ratified by conventions of the people in nine of the thirteen States of the Confederation, and it actually went into operation when conventions of the people in only eleven of these States had ratified it.

I shall not enter upon any criticism or any scientific explanation of these procedures. I will only say that to my mind they were entirely extra-legal, and therefore revolutionary, but were necessary because of the absence of any workable method of amendment in the Articles of Confederation.

Warned by this experience, the framers of the new constitution wrote a method of amendment into this instrument which they expected could be and would be effectively exercised.

It *was* exercised, first, to limit the powers of the central government in behalf of the individual, to perfect the realm of individual immunity against the powers of the central government. This was in the line of true progress. It was applied, in the second place, in behalf of the exemption of the States from the jurisdiction of the United States courts, which was the first result in constitutional law of the reaction of 1793 against the national movement of 1787. And it was employed, in the third place, to cure some of the defects in the election of the President and Vice-President. Then for more than sixty years, while the mightiest changes were being realized in the social, political, industrial, commercial and educational conditions of the country, not one trace of any of these changes found its way into the constitutional law of the nation.

We may say that during these years the main direction of the social, political and economic forces down beneath the constitution was, whether consciously recognized or not, towards limiting the powers of the States of the Union in behalf of the powers of the central government and the liberty of the individual. The

pressure of the movement was so strongly felt by a great portion of the people of the country, and so strongly resisted by another great portion, that it led to the appeal to arms of 1861. The method of amendment, intended for every exigency, had proved itself unequal to the emergency, and when employed again in the last three constitutional changes it simply registered the results of battle. In the main, what was then and thus accomplished was correct in substance; but the method which was necessitated showed again that nothing like the perfect principle and form of constitutional amendment had been reached.

And now, again, for thirty-five years mighty changes have been wrought in the structure of our political and civil society and in our commercial and industrial relations, and yet not one of them has been registered, by the process of amendment, in our constitutional law.

From this brief review, it seems entirely manifest that the method of amendment provided in the Constitution of the United States is ordinarily unworkable, and that the first problem of the constitutional law of the present in this country, as well as in almost all other countries, is the revision of the provision for constitutional amendment. Let us now scrutinize a little more closely the details of the provision in order to make its defects clear and definite. At the very first glance we discover that really four methods of amendment are legalized by the provision. The first method authorizes the initiation of an amendment by a constitutional convention of the United States, called by Congress on demand of the legislatures of two-thirds of the States of the Union, and ratification by conventions of the people in three-fourths of the States. The second method authorizes the initiation of an amendment in the same manner and by the same body as the first and ratification by the legislatures of three-fourths of the States. The third method authorizes initiation of the amendment by a two-thirds vote in both houses of Congress and ratification by conventions of the people in three-fourths of the States. And the fourth method authorizes initiation of the amendment in the same manner and by the same body as the third and ratification by the legislatures of three-fourths of the States. Only one of these methods, however, has been employed, *viz.*

the last. Convenience has dictated this, and convenience is ordinarily stronger than principle in a country which moves so fast as ours.

Now it is evident that what makes these methods of amendment practically almost unworkable is the extraordinary majorities required both in the initiating and in the ratifying bodies. The idea was, of course, to make constitutional change conservative. This was indeed a laudable purpose; but such conservatism is a dangerous thing when it is mechanical and artificial, and it always becomes such when it permanently prevents the will of the undoubted permanent majority of the whole people in a democratic republic from realizing its well considered and well determined purposes in its organic law. There is a natural way to secure and preserve true conservatism, a way which does not contradict the fundamental principle of majority right, and that way should always be followed.

This matter of the majority is not, however, the sole element in the problem of a proper provision for constitutional amendment. There are several other points of great importance. One I have already adverted to, *viz.* the error in sound political science of using the governmental organs for the making of constitutional law. To illustrate this, let us consider the process of constitutional amendment in the German imperial constitution. According to the provision of amendment in that instrument, constitutional law can be made by a simple majority vote in the *Reichstag* sustained by forty-five of the fifty-eight voices in the *Bundesrath*, while the two bodies by simple majority vote in each make ordinary law. Now it is the impulse of the *Reichstag* to call every measure which it desires to see passed ordinary law, and it is the impulse of the minority in the *Bundesrath* to call every measure which it desires to defeat constitutional law, and the constitution provides no organ for determining a hermeneutical contest over this point, unless the Emperor's power of promulgating the laws covers the question. Some of the commentators upon that instrument contend that it does. Some say that in the exercise of his power of promulgating the laws the Emperor may look into the content of any measure, and that, if in his opinion the measure is one of constitutional law and has not received the proper major-

ity in the *Bundesrath* for making constitutional change, he may refuse promulgation. But the *Reichstag* does not accept this doctrine. Moreover, it is the practice in the imperial legislature to allow the passage by that body of a law which is not authorized by any power at the time vested in that body by the constitution, provided the law has received in the *Bundesrath* the majority necessary to make a constitutional change. Such a law is not inserted in the text of the constitution as an amendment to that instrument, but is incorporated in the ordinary statutes; and the question at once arises, how such a law may be repealed, whether by the method for making or repealing ordinary law or by that necessary for making constitutional changes.

Under such a practice the whole question as to what is constitutional law and what is ordinary law becomes confused. From the point of view of written constitutions, constitutional law is the law provided in the constitution. From the point of view of unwritten constitutions, on the other hand, constitutional law is that part of the law which ought to be regarded as fundamental and organic. There is sufficient opportunity for difference of opinion in regard to the first kind of constitutional law, but in regard to the second there is no complete agreement on the part of any two minds. Of course the two kinds of constitutional law ought to agree exactly. What, from a true philosophical point of view, is fundamental and organic ought to be in the constitution, and, *vice versa*, every provision included in the constitution ought to be fundamental and organic. But in practice there is a wide difference, as to result, between the interpretation of a written instrument and the formation of individual or popular or legislative or executive opinion as to what part of the law ought to be regarded as fundamental and organic and what part as ordinary. In the first process there is some measure of certainty and continuity; in the second, on the other hand, there is very little. And when the two processes of determination are authorized in the same political system, they are bound to produce inextricable confusion. The root of the difficulty is to be found in making the governmental organs the organs for constitutional amendment. The *personnel* of the government, especially of the legislature, may be used for making constitutional

law. It would be inconvenient, and pernaps injurious, if it could not be. But it is not necessary that this should be effected through the governmental *organizations*. That personnel may be specially organized for this purpose, as the French constitution provides, by uniting all the members of both legislative chambers in one national constitutional convention with constituent power. The body authorized to make constitutional law and constitutional law only being entirely distinct from the body authorized to make ordinary law and ordinary law only, even though composed of the same individual persons, there can be no possibility of confounding the two kinds of law.

Finally, there is a grave problem of constitutional law involved in the exception, to be found in some of the constitutions, of certain subjects from the general power of amendment. This occurs usually in the constitutions of those states which have the federal form of government, as in the constitutions of the United States and of the German Empire, where the existing relations of representation of the States of these Unions in the upper chamber of the legislature is excepted from the ordinary course of amendment and made subject to a still more impossible process. And strangely, and in an even more exaggerated form, this defect is to be found in the French constitution, where two subjects are excepted from any method of amendment whatsoever, *viz.* the form of the government and the disqualification of the descendants of former reigning houses for the presidency of the Republic. These exceptions to the power of the legal sovereign in amendment are rotten spots in any constitution, and if not rooted out they will spread until their mouldering influence will be felt throughout the entire system.

The practical and all-important question, however, is as to the way in which they can be eradicated, regularly and lawfully, and without recourse to revolutionary means. Take again for example the Constitution of the United States, which declares, in the article of amendment, that "no State, without its consent, shall be deprived of its equal suffrage in the Senate." This means, of course, that if the attempt should be made to reduce the representation of any State in the Senate in relation to that of the other States, by the process of constitutional amendment,

this can be effected only with the consent of the legislature of, or of the convention in, the State whose relative representation it is proposed to reduce, together with the consent of one or the other of these bodies in enough of the other States to make out a three-quarter majority of the whole number; and that if the attempt should be made to increase the relative representation of any State, this can be effected only with the consent of every other State of the Union, given through its legislature or convention.

There is thus, theoretically, a way provided for expunging from the Constitution this exception to the ordinary operation of the legal sovereign, the amending power; but practically it is utterly unworkable. If we are ever to rid ourselves of this obstacle we must find some other way than that which I have just outlined. But is there any other legal way? Can the amending clause itself be revised by the ordinary course of amendment so as to omit the exception in behalf of the equal representation of the States in the Senate? It certainly can be so revised as to anything and everything else. But I am quite persuaded that the framers of the constitution never intended to provide any means whereby this exception could be set aside. I am quite sure that they intentionally placed this obstacle in the way of the legal sovereign, as they organized it for ordinary action. I do not think that they realized the fact that they were sowing the seeds of revolution upon this subject by erecting an insurmountable barrier to regular constitutional progress concerning it. The great, natural, universal and irresistible principle of development was not then understood as now. Men really believed, at that stage in the growth of philosophic thought, that they could construct for all time institutions which would need no change or improvement.

There is, indeed, good ground in political philosophy for holding that the amending clause in a constitution may itself be revised by the general process provided therein. These grounds are that there cannot logically be two legal sovereigns within a constitution any more than there can be two original sovereigns behind the constitution, and that there cannot logically be any exceptions from the power of the legal sovereign any more than

there can be from the power of the original sovereign. Different methods of governmental action in regard to the same subject, and exceptions from the powers of the government, are all scientifically legitimate, but the exercise of sovereignty is an entirely different matter. One body and only one can possess it at any given time within a given state, and from its operation nothing whatsoever can logically be excepted. But when we shift from the legal to the political ground in respect to this subject are we not contemplating a revolutionary act? I think this must be acknowledged. It must be conceded that we are contemplating the same kind of a revolutionary act as that committed by the national constitutional convention of 1787 and the ratifying conventions within the States of the Confederation. If that was justifiable, this would be, and upon exactly the same ground, *viz.* that existing legality upon this subject does not comport with the social, political and economic conditions of a national democratic state, but contradicts them in an unendurable way and to an unendurable extent. Sound political theory demands that the amending power within the constitution, the legal sovereign, should be an organization faithfully representing the original sovereign behind the constitution; separate from and independent of the powers of the government, and supreme over these powers and over the liberty of the individual; subject to no limitations or exceptions; sufficiently facile in its action to meet all important exigencies and, when using the governmental organs at all in the making of constitutional law, using them in a ministerial but not in a discretionary capacity. And sound constitutional law demands the same things. Without them the system of constitutional government and constitutional liberty will not be able to stand in permanence. The invincible principle of development will force changes upon any and every constitutional system, as upon everything else in the universe; and if these changes cannot be made by amendment, by the legal sovereign, they will inevitably be made by the government or some part of the government — in Europe by the legislature as a rule, and in the United States by judicial approval of legislative or executive acts. But whichsoever of these two methods be followed, it comes to the same thing, *viz.* gradual governmental usurpation against

the limitations of the constitution, the ultimate destruction of the constitutional system.

These are the considerations which lead me to hold that the first great problem, logically, of the constitutional law of the present is the construction of a proper provision for amendment, which shall have the qualities which I have just outlined. Not a single great state in the world has such a provision in its constitution, and not a single one has anything approaching it, except, as I have said, France and Switzerland. Of these two, Switzerland has come nearest to it in the provision which allows an amendment to be proposed by fifty thousand Swiss voters and to be ratified and adopted by a majority of the Swiss voters, provided this national majority includes a majority of the voters in a majority of the cantons. The Swiss process of amendment uses the governmental organs at one or two points only, and then only in a ministerial way. The great defect here is that throughout the whole process there is no place nor opportunity for any sufficient discussion of the projected amendment. Such a defect is fatal to any sound development in human affairs.

The second great problem of the constitutional law of the present is, in my judgment, the proper construction of the upper legislative chamber.

With the exception of the princely power this is the oldest among national political institutions. The lower chamber in the legislatures of the present is a modern institution, based upon manhood suffrage or something very near manhood suffrage, and upon representation according to numbers. The senates, on the other hand, are in most cases relics of mediævalism, based upon a variety of sources as to tenure, and with little pretense of a distribution of representation according to modern principles. These defects are to be found even in the senates of some states which have been founded since the close of the middle ages. I think it may be broadly affirmed that, of the seventeen states of the civilized world worthy of mention as having a constitutional law, only four have solved the problem of the upper legislative chamber with anything like a fulfilment of the demands of modern theory or modern conditions; and these four are not states of the first rank in power. They

are Sweden, Norway, the Netherlands and Belgium. Moreover these four are all states with centralized governments, that is, states which are better situated than those having federal governments for the solving of this problem. Of these four, Sweden has come nearest, in my judgment, to the ideal modern solution, providing in its constitution for the election of the senators by the provincial assemblies and the municipal assemblies of such cities as are not under provincial government (all of which bodies are elected by the voters) and distributing the representation in the Senate according to population. This is both conservative and democratic: conservative in the method of the election, and democratic in the method of the distribution of the representation. In the Swedish legislature there is also absolute parity of powers between the two houses, both in the initiation and passage of legislation. Both houses come ultimately from the people, both represent the whole people, both rest upon the same principle of distribution of seats, *viz.* population, and both exercise the same power in legislation, fulfilling thus the four chief requirements for the senate of a modern state.

Apparently the Norwegian Senate approaches as near the solution of the modern problem as the Swedish. But a little consideration of the details will show that this is not quite true. The Norwegians elect all of their legislators as one body; and when they all assemble as one body, the separation into two bodies is effected by drawing lots, one-fourth of the whole number constituting in this manner the Senate and three-fourths the other chamber. The main defect in this method of organizing a senate consists in the fact that it will be composed entirely of members coming from parliamentary districts not represented at all in the other chamber, and *vice versa;* that is, three-fourths of the parliamentary districts are represented in one chamber only and one-fourth in the other only. This tends to the sectionalizing of views and to the weakening of the national consciousness and spirit, or at least to the hindering of the development of the national consciousness and spirit. Then there is another defect. The one-fourth selected in this way and representing directly only one-fourth of the parliamentary districts can not maintain a parity of power with the other chamber composed of members

directly representing three-fourths of these districts. This is manifest in the provision of the constitution itself, respecting the mode of legislation. If the two chambers cannot agree upon a project of law, the constitution orders that they shall, at last, unite in the one original assembly from which they proceeded and determine the matter there. This means, of course, that after a certain time the Senate must practically always succumb to the will of the other chamber. These are serious defects, so serious as almost to take Norway out of the category of states that have made most progress in the solution of the problem.

The members of the Netherland Senate are chosen in the same manner and by the same kind of bodies as those of the Swedish upper chamber; but in the distribution of the seats some consideration is paid to the provincial lines, the distribution not being in exact accord with the principle of population, though not far away from it.

Finally, in the Belgian system, there is a complexity both in the method of choosing the senators and in the distribution of the seats which amounts in each respect to a defect. Most of the senators are chosen directly by the voters, and in the election of these senators, two lower-chamber districts constitute one senatorial district. This is simple and democratic, although somewhat radical. The other seats are filled by the provincial assemblies, and in the distribution of these seats among the several provinces much consideration is had to the provincial lines, the less populous provinces being favored. The purpose of this device is to offset the radical method by which most of the senators are elected, *viz.* the direct vote. This is certainly a makeshift. It would have been far more in accord with sound theory to have provided for the choice of all the senators by the provincial assemblies, while distributing the seats among the provinces according to population. There is nothing necessarily undemocratic in the practice of indirect election, but it is quite undemocratic to distribute the seats in any legislative body except in accordance with the principle of population, or at least in a manner approaching that principle.

When now we turn to the construction of the senate in the other thirteen constitutions, we find ourselves in the midst of a chaos in

the practice with no consistent principle to guide us. We find seats held by virtue of hereditary right, as most largely in the British, Austrian and Hungarian constitutions, but partly in the Spanish constitution also; a system which is certainly mediæval both in origin and spirit. In the same constitutions we find seats held by virtue of office; a system which, besides being for the most part mediæval, conflicts with the modern principle of the incompatibility of office with legislative mandate. We find seats held, again, by royal appointment, as partly in the four systems just mentioned and also in that of Denmark, almost exclusively in the German *Bundesrath*, and exclusively (excepting the seats of the princes of the royal house) in the Italian and Portuguese Senates. Such an appointed Senate is, as a rule, the weakest sort of upper house, being generally a sort of appendage to the crown, affording it no support, but bound to go down with it under popular assault. Finally, we find seats held by election, almost always in the indirect form, as partly in the systems of Spain, Hungary, Denmark and Great Britain, and exclusively in the systems of France, Switzerland and the American states. The elective element in the British House of Lords and in the Hungarian *Magnaten-Tafel* is slight. In the Spanish system one-half of the senators are elected for a term of ten years; and in the Danish system fifty-four of the sixty-six members are elected for a term of eight years. These two countries are headed in the right direction in so far as the senatorial tenure is concerned. But in neither of these cases, and in none of the cases where election is the sole source of the tenure (except, of course, the first four already treated of), and, of course, in none of the other cases, is there any approach to the modern democratic principle of distribution in proportion to population.

It is about as certain as anything human can be that all the species of senatorial tenure except that by election will pass away. It may be expected that the tenure by hereditary right in Great Britain and that by royal appointment in Germany will be the last to yield. But they must all go sooner or later; and it is one of the great problems of constitutional law in all of these states to find the proper and natural substitutes for these antiquated forms or modern makeshifts. It is also a great problem in those

states which have already established the elective tenure for a portion of their senators so to reform the senatorial electoral bodies as to make them more representative of modern conditions. As I have said, there is no sound objection in modern political theory to the indirect election of senators; but the electoral bodies must be truly representative of the original voters, and they must exercise power in the election proportionate to the population which they represent. This is not the case in any of these states. In all of them the original electorate for the senators is much narrower than for the members of the other chamber; and the weight exercised by the different electoral colleges is far from being proportionate to the population of the districts for which they act.

In the five states with republican governments, the ultimate source of the senatorial tenure is naturally the same as that of the membership of the other chamber; and in so far as that point is concerned, they may be said to have solved this part of the senatorial problem. But when we come to the provisions of these constitutions which relate to the distribution of the senatorial representation, we find ourselves confronted with one of the gravest questions of their constitutional law.

Let us consider briefly the facts in each case, beginning with France. Possessing a centralized government, France has not the same reason for making concessions to the lines of local government or administration as have states with systems of federal government. The extremes in the senatorial representation are found in the *départements* of the Hautes Alpes and of the Seine. From the point of view of population, the mountaineers of the former district are about six times more strongly represented in the Senate than the inhabitants of the highly civilized city of Paris. The average discrepancy, however, is not at all so great. Nevertheless it is true that a minority of the population of France is represented by a majority of the seats in the Senate. It is a minority not far removed from the middle line, but still always a minority. It may also be said that the advantage lies, on the whole, rather with the *départements* which are moderately populous, although the greatest advantage lies with the least populous, and the greatest disadvantage with the most populous. While

there is here a problem for the French statesmen, it is not of a very serious nature. More serious for them is the problem of regulating the weight of the communes in the senatorial electoral college for each *département;* for here the smaller communes are as a rule much over-represented.

When we turn from France to the states with federal governments, we become immediately aware that, in the distribution of the senatorial seats, other considerations than the modern doctrine of distribution according to population have been in all cases determinant.

In the first place, in democratic Switzerland, we find that the canton Uri is about thirty times more strongly represented in the *Ständerath*, or Senate, than is the canton Bern, and that the twelve least populous cantons, containing not quite one-third of the population of the whole of Switzerland, are represented in the Senate by a majority of the voices.

Secondly, in the leading state of South America, Brazil, and in the leading state of Central America, Mexico, we find about the same conditions. The Brazilian commonwealth of Matto Grosso is, from the point of view of population, about thirty-four times more strongly represented in the national Senate than the rich and populous commonwealth of Minas Geraes; and the eleven least populous commonwealths of the Brazilian republic, containing about three million inhabitants, are represented by a majority of the voices in the national Senate, while the other ten commonwealths with a population of almost twelve millions are represented by a minority of the senatorial seats. Likewise in the Mexican republic, the commonwealth of Colima is, from the point of view of population, about eighteen times more strongly represented in the national Senate than the commonwealth of Jalisco; and the fifteen least populous commonwealths, containing less than three and a half million inhabitants, are represented in the Senate by a majority of the voices, while the thirteen more populous commonwealths, with a population of more than ten millions, are represented by a minority of the senatorial voices.

But it is the democratic republic of North America which exhibits the most thoroughgoing rotten-borough Senate of any state in the civilized world. In this Union the smallest com-

monwealth, from the point of view of population, is Nevada with 42,335 inhabitants, and the largest is New York with 7,268,894.[1] From the point of view of representation according to numbers, the inhabitants of Nevada are nearly one hundred and seventy-two times more strongly represented than the inhabitants of New York. Again, there are now forty-five commonwealths in this Union with a population of over seventy-six millions. Of this population about fourteen millions reside in the twenty-three least populous commonwealths, and over sixty-two millions in the twenty-two more populous commonwealths. That is, fourteen millions of people are represented in the United States Senate by forty-six senators, while more than sixty-two millions are represented by only forty-four senators.

Of course it may be said, and it is said, that in states with systems of federal government the members of the national senate do not represent the people, but the commonwealths of the Union, and that, therefore, the principle of representation according to population does not apply to the senates of such states. But what, after all, is a commonwealth or State in a democratic republic with a federal government? Is it anything more than the organization of the people within a given district for their autonomous local government? And is there any sound reason why a few people so organized in one district should be equally represented in either house of the national Congress with a great many more people organized in another district for the same purpose? If it were always true that the smaller population possessed all the elements of intellectual and moral culture to a higher degree than the larger, it might be held, perhaps, as a principle of political ethics that the representation of the smaller number should be relatively stronger than that of the larger. But who will say, for example, that the peasants and mountaineers of Uri are superior in knowledge and virtue to the citizens of Bern, or the miners of Nevada to the inhabitants of New York?

I understand only too well that there are still those who will say that the reason for the equal representation of the commonwealths in the national senate is that they are sovereign states, and that sovereignties are equal in representative right no matter

[1] According to the Census of 1900.

what may be their relative strength in population or in any other element of power. My answer to this is, that this is a principle of international law, not of constitutional law; that the commonwealths in these four systems which we are considering are not sovereign states; that in two of them they never were sovereign states nor anything like sovereign states; that in one of these nations, Switzerland, the most of the cantons were once something like petty sovereignties under the *Eidgenossenschaft* and under the Confederation of 1815–48, but were deprived of that quality by the Swiss nation in 1848; and that in the other, the United States, thirteen of the commonwealths possessed something which they called sovereignty under the Articles of Confederation of 1781–89, but were deprived of that quality by the national popular movement of 1787, culminating in the establishment of the national Constitution instead of the quasi-international Articles of Confederation, and that by the trial of arms of 1861–65 the claim to sovereignty by any commonwealth of this Union was put forever to rest.

According to modern views, principles and conditions, no rule of distribution of legislative seats in either chamber except the rule of population can rightfully prevail in a national democratic republic, no matter whether the governmental system be centralized or federal. Some concessions can, of course, be made to administrative convenience, but they must never amount to the permanent investment of a minority of the people with a majority of the voices in either branch of the law-making body, especially where this minority and also the majority are sectional in their composition and not general. Even if we accept the doctrine of minority representation, it would not justify the practice of sectional overweight, which we are considering.

As I have indicated in another connection, it will not be easy to deal with this problem in the United States or in the German Empire. In the other states with federal governments this defect may be cured by the ordinary course of amendment, but in the United States and the German Empire this subject is excepted from the ordinary course of amendment and placed under the protection of a procedure which can, in all probability, never be applied so as to effect any change. Nevertheless, the question

will have to be met, and the problem will have to be solved here as well as elsewhere. It may not be done, it probably cannot be done, with exact legality; but we have the precedent in American constitutional history for a convention of the United States acting with conventions of the people in nine-thirteenths of the commonwealths to disregard the prescripts of the existing law in the amendment or revision of the organic law. We can bring such bodies together by means and through forms already provided in the constitution, and we can go back to the principle, as in 1787, that they represent the sovereign behind the constitution and are not, therefore, bound by the exceptions from the legal power of amendment provided in the constitution. You may call this revolutionary. I think we shall have to concede the point; but it would be a revolution standing on the border line between original sovereign action and legal procedure, and would, probably, be as bloodless as that of 1787.

The third great problem of the constitutional law of the present is, as I conceive it, the fixing of the fundamental relation between the legislative and executive branches of the government. The experience of the world has developed three fundamental systems of practice in regard to this subject. We may term them the presidential system, the parliamentary system and the directorial system.

The principle of the first is substantial independence of the executive and of the legislature, both in tenure and procedure. The tenure of the executive does not, according to this principle, originate in the legislature, and cannot for merely political reasons be determined by the legislature; that is, the legislature cannot impeach, or require the resignation of, the executive or his ministers merely on account of political disagreement with them. Nor, on the other hand, does the tenure of the legislative members originate in the executive nor can the executive cut short their term by dissolution. Neither the executive nor any of his ministers have seat or voice or vote in the legislative chambers, but, on the other hand, the executive is furnished with a veto power upon all legislative acts, practically strong enough to secure his prerogatives against legislative encroachment.

The principle of the second, the parliamentary system, is substantial harmony between the executive and the majority party in the legislature. This is established and maintained by the constitutional requirements that the executive shall take his ministers from the leadership of the majority party in the legislature or in the more popular chamber thereof, shall follow the advice of his ministers, and shall dismiss them from office, generally through the form of voluntary resignation, when they fail to receive the support of that majority upon fundamental questions, or else shall dissolve the legislature or the lower chamber thereof, and appeal to the voters, whose decision must be acquiesced in by all, to restore the lost harmony. Under this system the real executive is the ministry. It bears the responsibility for the executive acts. Its members have seat, voice and vote in the legislative chambers, but no veto upon legislative acts.

The principle of the third, the directorial system, is the complete subordination of the executive to the legislature, that is, complete control of the executive tenure by the legislature, entire responsibility of the executive to the legislature, no power in the executive to dissolve the legislature or either branch thereof, no seat, voice or vote in either of the legislative chambers except by order or permission of the chambers, and no veto upon legislative acts. On the other hand, while the executive is as a rule permitted to introduce measures into the legislature, their defeat or rejection does not call for the resignation of the directory or of that member of it particularly responsible for the project. He or they must simply submit to the will of the existing legislature in every case and go on under its instructions.

The presidential system goes naturally with the elected executive, the parliamentary with the hereditary executive, while the directorial system belongs scientifically nowhere. The directory is scientifically and historically discredited as an executive system. It exists in only one of the seventeen states which I have brought under this study, *viz.* Switzerland, although it seems to be on the way of establishment in one other, *viz.* Norway, where the successful insistence of the Norwegians that the king's ministers shall sit in the legislature and shall resign when out of harmony with the legislative majority, without according the

king the power of dissolving the legislature and appealing to the voters to settle the question in a new parliamentary election, is certainly tending to make the ministry a directorial board, completely subject to the legislature. Switzerland being an internationally neutralized state may make experiments with a weak executive. For Norway such a situation is more dangerous. In both cases it seems to me an unsatisfactory solution of the executive problem and one which calls for revision.

Of the other fifteen states, all that have hereditary executives, except the German Empire, Austria and Hungary, have developed or are developing, substantially, the parliamentary system. They are, at least, all moving in the direction of the English model, and are destined to arrive, sooner or later, at something like the English result. All the road, however, from their present stage of development of the system to its ultimate form, will be strewn with problems; and their best course is to look to English experience and to follow, as nearly as somewhat different conditions will permit, in English footsteps. It is most important to kings and emperors themselves that they should recognize the fact that the parliamentary system of relations between the executive and the legislature is a necessary contrivance for reconciling modern political thought and modern political conditions with the hereditary tenure of the executive. If they resist too far its establishment and development, they will simply provoke a republican revolution which will sweep them away. The royal imperial houses of Hapsburg and Hohenzollern, old and powerful and popular as they are, cannot in the long run resist this movement. It is the greatest constitutional problem, from the point of view of their own interests, with which they have to deal, and it behooves them to devote themselves to its thorough comprehension and its rational and natural solution.

With the exception of Switzerland, which needs no further consideration, and of France, the states having elected executives follow the presidential system. This is natural and rational, and I consider that in these states the executive problem has been fairly solved to meet modern conditions and requirements. It is quite true that in the United States and Mexico the method of indirect election of the executive is criticised, and that in the

practice of the United States the law for counting the electoral vote has, until recently, been quite faulty and is not yet entirely perfect. It is also true that some advantage might conceivably be gained by allowing the presence of the cabinet officers in the houses of Congress to explain proposed executive measures or even to propose administrative measures. But from the point of view of this paper these are matters of detail, and they cannot be discussed within its limits.

It is the French Republic which is confronted with the serious problem in regard to the executive and its relations to the legislature. The French Republic is attempting to work the system of parliamentary government with an elected executive. From the points of view of historical experience and sound theory this appears as an unnatural and, in the long run, unworkable combination. The real parliamentary system requires, as I have already remarked, not the complete subordination of the executive to the legislature, but harmony of action between the two and a power in the executive either to dismiss his ministers or dissolve the legislature in order to restore harmony upon important issues when it has been lost. No democratic people will entrust the executive with such power over the legislature, and if they would, the executive would not dare to use it. It requires all the historic power, prestige and mystical influences of the hereditary executive, the so-called sovereign, to exercise such a power. The French have attempted to help themselves over this difficulty by vesting the power to dissolve the Chamber of Deputies in the President with the consent of the Senate, the Senate itself not being made subject to executive dissolution. This may give the President a certain backing which may enable him to act occasionally. It did so in one or two early cases. But this is no fulfilment of the requirements of the system. The executive alone must have the power of dissolution over the entire legislature, or at least over the entire elected part of the legislature; and it is not sufficient that the executive shall have it over only one chamber of the legislature, and then only when sustained by the other chamber. Conflicts between the two chambers might be settled in this way, but not conflicts between the executive and the entire legislature, and the settlement of

such conflicts is the prime purpose of the parliamentary system. When the relation prescribed by the French constitution was established, that instrument provided that the seventy-five senators, one-fourth of the whole number of senators, originally chosen by the national convention which framed and adopted the constitution, should hold for life, and that their successors should be chosen by the Senate itself and also hold for life. Here was a certain nucleus of strong conservatism and support for the executive. All that has been changed by the constitutional amendment of 1884, and all the members of the Senate now proceed ultimately from the same source as the deputies. The French Senate has now arrived at the consciousness of a solidarity of interest with the Chamber of Deputies upon the subject of legislative prerogatives *versus* executive prerogatives; and the power of dissolving the Chamber of Deputies, entrusted to the French President under the more favorable conditions for its exercise just mentioned, has now become practically obsolete. The French system is, therefore, veering towards the directory. This will not serve for France, however it may work in Switzerland or even in Norway. France must have a strong executive. If France will have a parliamentary system, then France must have a king. If, on the other hand, France will have an elected executive, then France must have the presidential system. This is her great governmental problem. All others should stand aside until this is substantially solved.

The fourth great problem of the constitutional law of the present, as I view these problems, concerns chiefly, if not wholly, the United States. It is the question of extending the legislation of the central government further into the domain of private law, especially in the regulation of commerce and matrimonial relations. The other states having federal governments, except Mexico, and, of course, all the states having centralized governments, have assigned these subjects to the legislation of the general government; and Mexico has gone much further than the United States in this direction.

Whatever may have been natural a century ago, when the settled parts of the commonwealths of this Union were separated from

each other by comparatively impassable districts of primeval forest and there was comparatively little intercourse between them, now, when these obstacles have entirely disappeared and intercourse is so active that no man notes his passage from one commonwealth into another, it has become entirely unnatural and scarcely longer endurable that the law governing commerce should not be exclusively national. The existence of the common law as the basis of the law of the commonwealths upon this subject has minimized the difficulty of a great nation getting on with systems of local commercial law; but the differences in detail, at first hardly noticeable, have now, on account of the vast development in the complexity of these relations, become almost unendurable. This problem should be dealt with by constitutional amendment, if possible. If not, then the United States judiciary must put a much more liberal interpretation upon the existing commerce clauses of the constitution. The distinctions between commerce "among the commonwealths" and commerce within the commonwealths have now become too attenuated to bear the strain much longer. They must go, or the federal system of government may break down entirely.

It certainly is not necessary for me to enter into any argument at all to show that the scandals of polygamy and divorce, which bring the blush of shame to the cheek of every true American, have their root in the system of local regulation of the subjects of marriage and divorce. The family relations are fundamental in the civilization of a nation. Their proper regulation must rest upon the national consciousness of right and wrong. States' rights must give way upon this point too, if they would stand in regard to those subjects which are not so completely national in their character. In fact the whole system of federal government, that is, dual government under a common sovereign, is now under great strain, in consequence of the rapid development of nations and of national states. It is a question whether it can stand against the centralizing forces in modern political and civil society. It certainly can not unless it yields the transfer of some subjects, such as those just mentioned, from local to central regulation. This has been done in Switzerland, in the German Empire, in Brazil, and, in large degree, in Mexico; and the United

States must follow the same course of development or witness soon the same sort of a movement for universal reform as occurred in 1787.

The fifth and last great problem, or rather series of problems, of the constitutional law of to-day which I shall consider in this paper relates to civil liberty.

From the point of public law, civil liberty, as distinguished from political liberty and moral freedom, is the immunity of the individual person within a given sphere against both the powers of the government and the encroachments of any other individual or combination of individuals. Constitutional law should construct this sphere, define its contents in principle, fix its boundaries and provide its fundamental guarantees and defenses. Usually this part of a constitution is called the bill of rights, although in its nature it is rather a bill of immunities.

Every written constitution in the civilized world, except that of France, contains such a division. Perhaps the constitution of the German Empire ought to be excepted, although the constitutions of the States of the Empire contain such provisions, and the Imperial constitution itself, in slight measure, contains them. The reason why it does not contain them in larger measure is quite apparent. It is simply because the imperial government is one of enumerated powers. This is not a sufficient reason, as we know from American experience; and the imperial constitution should be amended in this respect, and the imperial government should be subjected to limitations, on the one side, and charged with powers against the States of the Empire, on the other, in behalf of individual immunity against governmental power.

The first great problem, however, under this topic is the French question of amending the French constitution so as to introduce into it a series of provisions concerning the immunities of the individual person. It is quite surprising that the French instrument should be defective in regard to this matter. Almost every French constitution down to the present one has contained such provisions in much detail. In fact, the French taught the European continental world the doctrine of individual immunity

against governmental power as a branch of constitutional law. It was at first thought that the omission of such a bill of immunities from the present French constitution was owing to the fragmentary nature of this constitution; but the French have now had nearly thirty years for the perfection of their instrument of organic law, and within this period they have had a constituent convention and have framed and adopted amendments to their constitution, but nothing of this nature was, I think, even proposed. We are, therefore, driven to the conclusion that the French statesmen and people do not consider such immunities for the individual to be necessary under their present political system, but feel, on the contrary, that with a government elective in all parts and an executive dominated by the legislature the individual is in no danger of governmental oppression. I do not know by what lessons of history or of more immediate experience the French have proved this doctrine to themselves. No government is more likely to ignore the natural limits between its powers and the immunities of the individual than an elective democratic government. The French have had this experience, more than once, themselves. I am, therefore, unable to regard this omission as anything less than a grave defect, presenting to the French a most serious problem of constitutional amendment.

As I have said, a bill of immunities is found in every other written constitution in the world, and its content is nearly the same in them all; but not a single European constitution provides any means for its lawful realization against the possible attempt of the legislature, nor in some cases of the executive, to encroach upon it, except perhaps petition to the government itself. That is to say, none of these European constitutions creates any judicial body vested with the power of interpreting constitutional limitations upon the powers of the whole government and of restraining the government from breaking through them. Many of them leave even the creation of the judiciary and the determination of its powers to legislative statute, which of course places the judiciary in a position of inferiority and subordination to the legislature. Others, while creating the courts by constitutional provision, fail to vest them with any such protective power. Even the constitution of Switzerland

declares outright that the judicial tribunals shall have no power to pass upon the constitutionality of legislative acts.

The principle of European jurisprudence upon this point seems to be that the legislature is the proper protector of individual immunities against governmental power. In Europe, the title government is applied only to the executive, and the statement of the proposition as it presents itself to the European mind would be that the immunities of the individual are protected against governmental encroachment by the representatives of the people. In America, on the other hand, we consider the legislature to be a branch of the government, and therefore it appears to us as a sort of Celtic hoax to speak of the government defending the immunities of the individual against itself. In fact some of our greatest statesmen have contended that the judiciary is also a branch of the government, and that we are subjecting ourselves to the same kind of a hoax when we imagine that the judiciary will, in the long run, protect the realm of individual immunity against governmental encroachment. It appears, at times, as if they were right, and as if the judiciary were really casting its lot with the political branches of the government for the purpose of expanding governmental power at the expense of individual liberty. Still, on the whole, this has not been true. On the whole, a judiciary established directly by the constitution, composed of judges with life terms, sustained by a sound popular knowledge of what the immunity or liberty of the individual purports and a general popular determination to uphold it, is the best possible organ to be vested with the protection of that immunity against governmental encroachment as well as against encroachment from any other conceivable source. It is the only real antidote for the doctrine of socialism in regard to civil liberty. The socialistic doctrine, stated in a sentence, is that the individual is subject at all points to the control of the majority. This doctrine is an absolute negation of the true principle of civil liberty. As we have seen, civil liberty is individual immunity within a sphere marked out by the constitution against governmental encroachment or encroachment from any other source. It is the constitutional realm of individuality. And if in any country all government and every organization and every indi-

vidual, except only one, should stand upon one side, and the single individual upon the other, it would be the constitutional duty of the body charged with the function of maintaining civil liberty to protect that single individual within this sphere against encroachment from any and every source, and to summon the whole power of the nation to its aid if necessary. And it would be the constitutional duty of those summoned to obey the call and render the aid required, although it might be directed against their own conceived views and interests. The doctrine of the greatest good to the greatest number and the principle of majority rule have no application whatsoever within this domain. When a constitution is being framed or amended, then the question of the nature and extent of civil liberty or individual immunity is indeed a matter of highest policy for the sovereign to determine in accordance with its own forms of procedure; but, once established, it becomes subject only to the provisions and principles of the constitution, interpreted by the organs of justice, and is removed entirely from the realm of legislative or executive policy and majority control. Now the only way to maintain this true idea and principle in regard to civil liberty is to put its protection under a non-political body, the organs of justice, not the organs for the fixing of policies, and to vest the organs of justice with the constitutional power to nullify any acts of the political branches of the government which may, in their judgment, undertake to encroach thereon. The legislature, in these modern times, is the branch of the government which is most prone to undertake these encroachments. The legislature is the branch which by its very nature regards everything as a matter of policy to be determined, at each moment, by majority action — and that action based upon majority will, not upon majority interpretation of higher law. It is the branch of the government which is almost sure to lose sight of the distinction between individual immunity and what it conceives to be general welfare, between justice and policy. It is absolutely certain to do so when a socialistic majority holds sway in the legislature. It was natural that the European peoples, accustomed to the despotism of the executive with the courts as a branch of the royal power, should have come upon the idea in the period of the revolutions,

that is, in the period of their transition from absolute to constitutional government, that the representatives of the people in the legislature would be the only reliable support for civil liberty. Perhaps this was correct for that period and for those conditions. But I am sure that that period and those conditions have now passed, and that the realm of individual immunity is now in more danger from legislative than from executive encroachment. It is under the force of this conviction that I contend that the problem of creating an independent judiciary by constitutional amendment and vesting it with the protection of individual immunity against governmental encroachment, whether executive or legislative, as well as against encroachments from any other source, is one of the chief constitutional problems now confronting the European states. It will cost some effort to educate the European peoples up to an appreciation of this idea. How far they are away from it is indicated by the fact that when they immigrate into the United States, because this is a "free country," as they say, they almost always do what they can, when they do anything, to obliterate that great distinction between individual immunity and general welfare, between justice and policy, upon which, more than upon anything else, American liberty rests. The doctrine of the labor unions, which are predominantly European both in their composition and tendencies, that an individual shall not be allowed to work upon such terms as he may be able and willing to make, because in the conception of the majority of some labor union, or perhaps of all labor unions, it may be detrimental to their general welfare, is a good example of the profound ignorance on their part of this great American distinction and principle. Difficult, however, as it may be to instil the idea of this distinction into the European mind, still I am fully persuaded that the attainment by the European peoples of real constitutional government depends upon it. The alternative to it is, in the long run, legislative absolutism.

While I hold up the Constitution of the United States as the model in this respect, yet I do not pretend that this model is entirely perfect. Two great problems have confronted the American practice during the last fifty years, neither of which has been satisfactorily solved, and neither of which, I fear, will be so solved without further constitutional amendment.

The first problem concerns the meaning of the thirteenth and fourteenth amendments, which, with the fifteenth, make up the constitutional product of the Civil War. There is not much doubt that the intention of the framers of these amendments was to place the entire domain of civil liberty or individual immunity under the protection of the United States authorities, and to vest the national judiciary with power to prevent encroachments thereon not only when proceeding from the government of the United States or the governments of the States but also when proceeding from combinations of individuals within the States. The Supreme Court of the United States has, however, held that these amendments did not extend the protecting power of the national authorities over this sphere to any such degree, but left the original control of the States over this domain unimpaired, except upon the specific points withdrawn by these amendments from that control; and that the national judiciary can protect the individual immunity provided in the fourteenth amendment only against encroachments attempted by the States, but not against those attempted by individuals or combinations of individuals within the States.

I contend that this is no satisfactory solution of the problem, because, in the first place, in a national state, although it may have a system of federal or dual government, sound political science requires that the entire individual immunity shall be defined, in principle, in the national constitution and shall have the fundamental means and guarantees of its defense provided in that constitution. The most fundamental and important thing in any free government is the system of individual immunity. Free government exists chiefly for its maintenance and natural enlargement. The contents of this immunity and the methods and means of its defense should therefore be determined by the national consciousness of right and justice. Any other principle than this belongs, not to the modern system of national states, but to the bygone system of confederated states. It was a resurrection of the doctrine of States' rights, in the extreme, when the Supreme Court of the United States put the interpretation which it did upon the new amendments — a doctrine which should have been considered as entirely cast out of this system by the results

of the Civil War. This solution is unsatisfactory, in the second place, because it perpetuates the contention between the nation and the States concerning the control of this sphere, while if there is anything in a political system that ought to be made clear and fixed and simple it is this domain of civil liberty. The welfare and prosperity of the whole people depend upon it in a much higher degree than upon any other part of that system. Uncertainty about it and contention over it cannot result, in the long run, advantageously to the average citizen, although it may allow a larger license to the powerful.

The second problem under this head to which I would refer has been produced by the experience of the last six years of the Republic in what is called its imperial policy. This problem had to come, sooner or later. No country with so high a civilization as the United States can keep that civilization all to itself in the present condition of barbarism or quasi-barbarism throughout the larger part of the world. It must share its civilization with other peoples, sometimes even as a forced gift. This is nature's principle, and no civilized state can permanently resist its demand. It came rather suddenly upon our country, and some of us thought that we were not quite prepared for it, that we had not yet placed our own house quite in order. But every student and observer of the world's history and the world's methods knows that civilized nations are not, in the great world plan, allowed to delay the discharge of the duty of spreading civilization until, in their own opinion, they are ready to proceed. Something always happens to drive them forward before they are perfectly prepared and equipped for the great work. And so before the United States had fashioned its constitutional law to meet the exigencies of a colonial or imperial policy, the possession of insular territory was thrust upon the great Republic. We had to take possession first, and then by force of necessity adjust our political situation to the requirements of the situation. It has not been an easy problem, and no one pretends that we have solved it perfectly or completely. Both the Congress, the executive and the courts have shared in the work and in the responsibility; but candor compels us to say that, if we are to continue in this sort of work, it would be desirable, to say the least, so to

amend the Constitution as to relieve the different branches of the government from the necessity of making usurpations of power, or something very like usurpations, to meet urgent conditions.

It is only since June 21 of the present year that we have been able to state with any certainty what the colonial policy, or imperial policy, of the Republic is. I think it can be now briefly expressed. It is that all of the territory of the North American continent over which the sovereignty of the United States may become extended shall be made, ultimately, States of the Union; and that all extra-continental territory over which it may become extended shall either be made, ultimately, States of the Union — as, possibly, the Hawaiian Islands and Porto Rico — or be erected into communities even more completely self-governing than States of the Union, under the protectorate of the United States — as Cuba already and, later on, the Philippines — that protectorate to be exercised chiefly for the purposes of preventing them from lapsing into barbarism internally, or from becoming a prey to the greed of other powers. This is a policy worthy of the Great Republic. It is the true imperial policy for a great civilized state engaged in the work of spreading civilization throughout the world. In comparison with it, the colonial policies of other countries appear mean and sordid and altogether lacking in the element of altruism necessary to real success in executing the mission of civilization.

Following such a noble policy as this, it is not difficult to forecast something of the future of this country. It might be a bold, but it would not be a reckless, prophecy to say that the child is now born who will see the States of this Union stretching from the Isthmus of Panama to the North as far as civilized man can inhabit, peopled by two hundred and fifty millions of freemen, exercising a free protectorate over South America, most of the islands of the Pacific and a large part of Asia. We possess already the extremes of this vast continental territory, as well as the great heart of it, and the most important Pacific Islands; and we have already a footing of influence in Japan and China hardly enjoyed by any other power. The exalted policy which I take to be the imperial policy of this nation cannot fail to extend that influence, prestige and power almost beyond measure.

Do not understand me as claiming the development of such a policy for the party at present in power in Congress and the present administration without the aid of their party opponents. I am not at all sure that, in the immediate enthusiasm of victory and under the necessity of exercising temporary absolutism in government in the newly acquired territories, the party in power would not have lost sight of the real purpose of their work in the world's civilization, except for the earnest expostulations of their opponents calling them back to the contemplation of the historic principles of the Republic. I rather fear they would. This noble policy is, therefore, the resultant of two forces rather than the direct product of one. It is the policy of the Nation rather than of any party within the Nation or of any part of the Nation. As such, it is sound and true and unchangeable, and is destined to be pursued no matter what party shall hold the reins of the government.

But we have some constitutional difficulties in the way of the realization of this policy. These difficulties relate to the constitutional powers of the United States government and the limitations imposed thereon in behalf of individual immunity within newly acquired territory. It is settled that the United States government may acquire territory for the United States by treaty or conquest; that it may set up a temporary military régime therein against which there is no constitutional immunity for the individual; that it may relinquish possession of such territory to the inhabitants thereof or to another power, either absolutely or under such conditions in the form of a treaty as may be agreed upon by the parties, and may enforce the stipulations of the agreement in such ways as may have been agreed on, or in such ways as are recognized by the customs and practices of nations; or that it may perfect its acquisition and transform the temporary military despotism therein into such civil government as Congress may establish under the limitations of the Constitution in behalf of civil liberty. I say that these points are all well settled. But there is some question about the power of the United States government to exercise a protectorate over peoples occupying territory which is not a part of the United States, especially when that protectorate shall not have been established by treaty

and shall not be exercised under the forms of international agreement or custom. There is not a word in the Constitution expressly authorizing it, and it is a grave question whether there is a word from which such power can be derived.

Moreover it has appeared to the United States government desirable, perhaps I should say absolutely necessary, to make the transition from military despotism in the government of some of these new acquisitions to a first and temporary form of civil government without constitutional limitations in behalf of individual liberty, that is, to a temporary civil despotism or something of that nature, and for this it is extremely questionable whether there is any warrant in the Constitution. In order to meet the wishes of the government, or perhaps the necessities of the government, in this respect, the Supreme Court of the United States has so strained its powers of constitutional interpretation as virtually to enact, in the opinion of a large number of the best citizens of the country, constitutional legislation — constitutional legislation, too, which upon one point at least contradicts the prime purpose of the only legitimate imperial policy which a free republic can have. It is quite possible that the state of society and of the population in a newly acquired district may necessitate more summary judicial processes than those of the juries, and that public security and even individual liberty will be better protected under the more summary forms; and that, therefore, a judicial interpretation of the Constitution relieving the government from these limitations as to process in such districts would have a moral ground at least to stand on; but when the court allows the Congress to overstep the constitutional limitations on the government in behalf of the freedom of trade and intercourse between the people of such districts and the people in other parts of the United States and to erect a special tariff against such trade and intercourse, and thus to destroy, or at least greatly weaken, the prime means of extending civilization to the inhabitants of such districts, *viz.* a free commerce in mind and things, then neither the court nor the Congress nor the administration has any ground of any sort on which to stand, and we need an amendment to the Constitution to express the reason and the will of the sovereign upon this subject.

We have in this whole question of territorial expansion one of the greatest problems of the constitutional law of this Republic, one which affects the whole world. It affects first of all the Republic itself, because upon its rightful solution depends the moral right of the Republic to have any imperial policy at all. It affects the peoples of the dark places of the world, who, though apparently unable to secure the blessings of civilization for themselves, certainly have the right to be left in their barbarism unless the intruding nation comes with a chiefly altruistic purpose. And it affects the other civilized powers in the example which it shall furnish them for their own work in the spread of civilization, for if the great Republic pursues an egoistic policy, they will certainly do likewise, and it is to be hoped that if it takes the other and the true course, they will not go in the opposite direction. No grander mission can be imagined than that which is now open to this American nation; and the time is now ripe for the sovereign people to discuss it in all its bearings, independently of ordinary party politics, and to write in the Constitution the methods and means which the government may employ, the purposes which its activities must subserve, and above all, the limitations upon the government in behalf of the civil liberty of every individual who may be brought under its jurisdiction or protection in realizing this transcendent mission, the civilization of the world.

John W. Burgess.